

IN THE SUPREME COURT OF MISSOURI

—

| | | |
|--|---|--------------------|
| In re the Estate of |) | |
| OLA H. BLODGETT, Deceased, |) | |
| |) | |
| HENRY W. BLODGETT, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| vs. |) | Appeal No. SC84699 |
| |) | |
| NORINE MITCHELL and |) | |
| BANK of AMERICA, N.A., in its |) | |
| capacity as Personal Representative of |) | |
| the Estate of Ola H. Blodgett, Deceased, |) | |
| |) | |
| Respondents. |) | |

—

Appeal from the Circuit Court of St. Louis County, Missouri
Twenty-First Judicial Circuit
Probate Division
Honorable Bernhardt C. Drumm, Jr.

—

SUBSTITUTE BRIEF OF APPELLANT
HENRY W. BLODGETT

—

On Transfer from the Eastern District
of the Missouri Court of Appeals

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- I. The Probate Court committed reversible error in its August 7 Judgment in granting summary judgment in Respondent Mitchell’s favor on Count II of her cross-petition, adjudging that Article VI, ¶ F of the Third Amendment to Decedent’s Trust constitutes a “list” within the meaning of Article Second of Decedent’s Will and Section 474.333, R.S.Mo. 2000, and in simultaneously denying Blodgett’s motion for summary judgment on his Petition seeking distribution of the items of tangible personal probate property to him pursuant to Article Second of Decedent’s Will, because the terms of Article VI, ¶ F of the Third Amendment do not satisfy all of the statutory requirements for a “list” under Section 474.333, R.S.Mo. 2000, and because Article

VI, ¶ F of the Third Amendment was not

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timely found by the personal representative of Decedent's probate estate as a compliant "list" in accordance with the terms of Article Second of Decedent's Will, in that:

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1. The terms of Article VI, ¶ F of the Third Amendment to Decedent's Trust fail to satisfy the statutory requirements for a list under Section 474.333, R.S.Mo. 2000, as said terms do not describe the items of tangible personal property of Decedent's probate estate or the devisees thereof with reasonable certainty, but instead provide for a distribution of tangible personal property of Decedent's trust estate to Respondent Mitchell for her subsequent distribution to unidentified third persons allegedly in accordance with unwritten instructions given by Decedent during her lifetime; and, moreover,

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2. Contrary to the explicit terms of Article Second of Decedent's Will, Respondent Mitchell's characterization of Article VI, ¶ F of the Third Amendment to Decedent's Trust as being a compliant list under Section 474.333, R.S.Mo. 2000 was

not presented to—and, consequently,

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not found by—the personal representative of Decedent’s
probate estate until more than 60 days after the Probate
Court’s issuance of letters testamentary on Decedent’s
Will.

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- II. In addition, the Probate Court’s August 7 Judgment must be reversed because there is no other basis in the record upon which it could be affirmed, in that Missouri law does not allow for a judicial rewriting of unambiguous terms of a last will and testament in the guise of will construction or reformation, and the terms of Article Second of Decedent’s Will are clear and unambiguous and resolve distribution of Decedent’s tangible personal probate property, notwithstanding that Article VI, ¶ F of the Third Amendment to Decedent’s Trust fails as a compliant “list” under Article Second of the Will and Section 474.333, R.S.Mo. 2000. Moreover, the Probate Court would have erred had it entered a judgment substituting the terms of Article Second of the Will with the inconsistent terms of Article VI, ¶ F of the Third Amendment to Decedent’s Trust for purposes of distribution of Decedent’s tangible personal probate property in

the guise of will construction or reformation, because such judgment would be contrary to the following statutory sections of Missouri's probate code, namely:

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1. Section 474.400, R.S.Mo. 2000, in that a substitution of the terms of Article Second of the Will with the inconsistent terms of Article VI, ¶ F of the Third Amendment would constitute a method of revocation of Article Second of the Will not prescribed under Section 474.400 and, consequently, not available to Decedent during her lifetime;

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2. Sections 473.083 and 473.081, R.S.Mo. 2000, in that a substitution of the terms of Article Second of the Will with the inconsistent terms of Article VI, ¶ F of the Third Amendment would effectively invalidate Article Second of the Will, thereby improperly providing Respondent Mitchell with a will contest remedy under Sections 473.083 and 473.081, notwithstanding that no will contest action was ever brought; and

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3. Section 474.333, R.S.Mo. 2000, in that a substitution of

the terms of Article Second of the Will with the inconsistent terms of Article VI, ¶ F of the Third

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Amendment would impermissibly validate the terms of Article VI, ¶ F of the Third Amendment as a compliant “list” for purposes of distribution of Decedent’s tangible personal probate property under Article Second of the Will in the guise of will construction or reformation, notwithstanding that such terms already would have been adjudicated as not meeting the statutory requirements for a compliant “list” under Section 474.333.

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- III. The Probate Court committed reversible error in its August 7 Judgment in granting summary judgment in Respondent Mitchell’s favor on Count I of her cross-petition for discovery of assets pursuant to Section 473.340, R.S.Mo. 2000, seeking recovery from Blodgett of certain items of tangible personal property claimed to be assets of Decedent’s probate estate, because but for the Probate Court’s erroneous adjudication of Article VI, ¶ F of the Third Amendment as being a compliant list within the meaning of Article Second of the Will and Section 474.333, R.S.Mo. 2000--and there being no other basis upon

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| <p>which Article VI, ¶ F of the Third Amendment could be adjudicated as a compliant list governing distribution of Decedent's tangible personal probate property--Respondent Mitchell would have lacked standing to pursue her discovery of assets claim against Blodgett pursuant to Section 473.340, R.S.Mo. 2000, in that Respondent Mitchell would have lacked any beneficial interest under Article Second of the Will as Blodgett would be entitled to distribution of all the tangible personal property of Decedent's probate estate.</p> | <p><u>Page</u></p> <p>46</p> |
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JURISDICTIONAL STATEMENT

This matter is before the Court on the appeal by Henry W. Blodgett (hereinafter **“Blodgett”**) from the August 7, 2001 Order and Final Judgment entered by the Honorable Bernhardt C. Drumm, Jr., of the Probate Division of the Circuit Court of St. Louis County, Missouri (hereinafter the **“Probate Court”**) sustaining the motion for summary judgment of Respondent Norine Mitchell (hereinafter **“Respondent Mitchell”**) with respect to Count I of her verified cross-petition, which was a claim for discovery of assets pursuant to Section 473.340, R.S.Mo. 2000, seeking to recover from Blodgett certain items of tangible personal property alleged to be a part of the probate estate of Ola H. Blodgett. (L.F. 26-30, 357.) The Probate Court’s August 7, 2001 Order and Final Judgment also incorporated by reference its prior memorandum ruling entered on April 17, 2001, granting Respondent Mitchell’s motion for summary judgment with respect to Count II of her verified cross-petition, which was a claim seeking the distribution of the items of tangible personal property of Ola H. Blodgett’s probate estate pursuant to an allegedly compliant “list” under Article Second of Mrs. Blodgett’s Last Will and Testament dated August 15, 1995 and Section 474.333, R.S.Mo. 2000. (L.F. 26-31, 323.) The Probate Court’s April 17, 2001 memorandum ruling also denied Blodgett’s motion for summary judgment with respect to his petition seeking the distribution of the items of tangible personal property of Ola H. Blodgett’s probate estate to him in accordance with Article Second of Mrs. Blodgett’s aforementioned Last Will and Testament. (L.F. 14-23, 323.)

The Probate Court's August 7, 2001 Order and Final Judgment was entered pursuant to Missouri Supreme Court Rule 74.01(b) stating that there was no just reason for delay with respect to the finality and appealability of its August 7, 2001 Order and Final Judgment and prior memorandum ruling of April 17, 2001, thereby rendering them appealable. (L.F. 357.)

This appeal followed when, on September 14, 2001, Blodgett filed his Notice of Appeal to the Eastern District of the Missouri Court of Appeals. (L.F. 358.) On May 21, 2002, the Missouri Court of Appeals affirmed the Probate Court's judgment.

Following this decision, Blodgett filed a Motion for Rehearing and Alternative Application for Transfer on June 4, 2002. The Court of Appeals denied these requests for post-opinion review on July 29, 2002. Thereafter, Blodgett filed an Application for Transfer in the Supreme Court of Missouri on August 13, 2002. On September 24, 2002, the Court sustained Blodgett's Application; therefore, the Court has jurisdiction over this matter under Article V, Section 10 of the Missouri Constitution and Missouri Supreme Court Rule 83.04.

STATEMENT OF FACTS

A. Pertinent Provisions of Last Will and Testament of Ola H. Blodgett Dated August 15, 1995

On August 15, 1995, Ola H. Blodgett (hereinafter “**Decedent**”) made and executed a document bearing the heading, “Last Will and Testament of Ola H. Blodgett” (hereinafter the “**Will**”). (L.F. 5-11.) In the first article of the Will provision is made for the payment of claims against, or expenses incurred by, Decedent’s Probate Estate. (L.F. 5.) The Will further provides for specific and residual distributions of Decedent’s Probate property, such provisions being set forth in the second and third articles of the Will, respectively. (L.F. 5-6.)

[Article Second]

The second article of the Will, entitled “Tangible Personal Property List” (hereinafter referred to as “**Article Second**”), provides for the disposal of the items of tangible personal property of Decedent’s Probate Estate pursuant to a written list, which must be found by the personal representative of said Estate within sixty (60) days following the issuance of letters testamentary for the Will. (L.F. 5-6.) Article Second further states that in the absence of such written list or any other provision of the Will that specifically bequeaths Decedent’s tangible personal property, such property shall go to “Henry W. Blodgett,” if living, otherwise to pass as part of the residue of Decedent’s Probate Estate (Id.). Article Second reads as follow:

SECOND: Tangible Personal Property List. I give each item of tangible personal property described by me on a list either prepared in my

handwriting or signed by me, and dated, to the persons, organizations, corporations or entities designated therein to receive the same. If at the time of my death I do not have the power of disposition by Will over one or more of the items of tangible personal property described in said list, such items shall be deemed deleted from said list and the gifts as to each such items shall lapse. If more than one such list is found, then the list bearing the most recent date shall be the only one in force and effect, all others being superseded. If letters testamentary are issued for my estate, no such list shall dispose of the tangible personal property set forth therein unless such list is found by my Personal Representative within sixty (60) days following the issuance of such letters testamentary. Each and every item of tangible personal property not effectively disposed of by such list, or not specifically bequeathed in any other provision of this Will, shall go to my son, HENRY W. BLODGETT, if living, otherwise the same shall go as part of the residue of my Estate.

(Id.).¹

¹Attached to the Will is an exemplar, styled “List of Tangible Personal Property” (L.F. 11); and a true and correct copy of the same is included in the appendix to this brief. (A1.)

[Article Third]

The third article of the Will, entitled “Disposition of Residue” (hereinafter referred to as “**Article Third**”), bequeaths the residue of Decedent’s Probate Estate—including the items of tangible personal property not effectively disposed of under Article Second of the Will—to the Successor Trustee of Decedent’s Indenture of Trust dated September 7, 1993.

(L.F. 6.) Article Third reads as follows:

THIRD: Disposition of Residue. All of the rest, residue and remainder of the property which I may own at the time of my death, both real and personal, and of every kind and description, wherever the same may be situated, I give, devise and bequeath to the Successor Trustee in a certain Indenture of Trust dated September 7, 1993, as amended, executed by myself as Grantor and by myself as Trustee, said property to be added to and become part of the corpus of the above-described Trust, which Indenture of Trust was executed prior to the execution of this Will. In the event that said Indenture of Trust at the time of my death is void for lack of corpus, or if this bequest is invalid or ineffective for any reason, I incorporate in this Will the terms of said Indenture of Trust at the date of execution of this Will, and I give, devise and bequeath all of said rest, residue and remainder of my estate to the Successor Trustees to be held and administered by them pursuant to the terms of said Indenture of Trust.

(Id.).

B. Decedent's Trust and Third Amendment Thereto

As indicated in Article Third of Decedent's Will, on September 7, 1993, Decedent executed an Indenture of Trust (hereinafter the "**Trust**"). (L.F. 6.) Decedent subsequently amended the Trust and, on October 3, 1997, executed a Third Amendment to her Trust (hereinafter the "**Third Amendment**"). (L.F. 199-201.) Article VI, Paragraph F of the Third Amendment (hereinafter "**Article VI, ¶ F**") reads as follows:

F. All of Grantor's tangible personal property and other personal effects shall be distributed to Grantor's sister, NORINE MITCHELL, if living, otherwise to her daughter, PAMELA PADGETT, to be distributed in accordance with instructions given by Grantor to them during her lifetime.

(Id.).²

C. Probate of the Will and Issuance of Letters Testamentary

On July 29, 1999, the Probate Court admitted Decedent's Will to probate. (L.F. 3, 12-13.) Letters testamentary for the Will were issued the same day indicating, inter alia, the appointment of Bank of America, N.A. as Personal Representative of Decedent's Probate

²Decedent previously had executed a First Amendment to her Trust appointing Boatmen's Trust Company as Successor Trustee of Decedent's Trust. (L.F. 104-116.) Respondent Bank of America, N.A. is the successor in interest to Boatmen's Trust Company.

Estate (hereinafter the “**Personal Representative**”), and Mr. T. Jack Challis as the Personal Representative’s attorney. (L.F. 3, 13.)

D. March 24, 2000 Letter of Respondent Mitchell’s Attorney to the Attorney for the Personal Representative

On March 24, 2000, more than 7½ months after the Probate Court’s issuance of letters testamentary for the Will, Respondent Mitchell’s attorney wrote to the Personal Representative’s attorney, Mr. Challis, requesting that all of Decedent’s tangible personal property under Article Second of the Will be distributed to Respondent Mitchell pursuant to Article VI, ¶ F of the Third Amendment. (L.F. 139-140.) In this letter, Respondent Mitchell’s attorney contended that Article VI, ¶ F of the Third Amendment constituted a compliant “list” within the meaning of Article Second of Decedent’s Will and Missouri’s list statute, namely Section 474.333 R.S.Mo. 2000, and that said document further met the Will’s requirement that such “list” be found by the Personal Representative within sixty days following the issuance of letters testamentary for the Will because the Personal Representative also was a co-trustee of Decedent’s Trust, as amended, and therefore had possession of the Third Amendment even before Decedent’s Will had been admitted to probate (Id.).

E. Blodgett’s Petition for Partial Distribution

On November 17, 2000, Blodgett filed a pleading in the Probate Court styled, “Petition for Partial Distribution” (hereinafter the “**Petition**”). (L.F. 14-23.) In his Petition, Blodgett averred his entitlement to a distribution of all the tangible personal property of Decedent’s probate estate pursuant to Article Second of the Will in the absence of a written “list” disposing of such tangible personal property otherwise (Id.).³ In this regard, Blodgett’s Petition averred as follows: (i) that Blodgett is the Decedent’s lone surviving child (Id.); (ii) that the Probate Court admitted Decedent’s Will to probate on or about July 29, 1999 (Id.); (iii) that more than six months had elapsed since the date of first publication of notice of letters testamentary for the Will (Id.); (iv) that no will contest had been filed with respect to all or a portion of the Will within the time prescribed by Missouri’s will contest statute, namely Section 473.083, R.S.Mo. 2000 (Id.); (v) that Decedent’s tangible personal property was included in the inventory of Decedent’s probate estate (Id.); (vi) that Article Second of the Will provides for the distribution of Decedent’s tangible personal property to Blodgett unless a list disposing of the tangible personal property otherwise was found and presented to the Personal Representative of Decedent’s probate estate within 60 days of the issuance of letters testamentary for the Will (Id.); (vii) that no such “list” was found and presented to said Personal Representative within that 60 day period (Id.); and (viii) that, accordingly,

³Decedent’s Will was attached and incorporated into Blodgett’s Petition as Exhibit “1” (Id.).

Decedent's tangible personal property should be distributed to Blodgett pursuant to Article Second of the Will (Id.).

F. Respondent Mitchell's Answer and Verified Cross-Petition

[Respondent Mitchell's Answer]

On December 12, 2000, Respondent Mitchell filed her Answer and Verified Cross-Petition (hereinafter "**Cross-Petition**"). (L.F. 3, 24-63.) For her Answer to Blodgett's Petition, Respondent Mitchell admitted that Blodgett was Decedent's lone surviving child and that the Will had been admitted to probate on July 29, 1999, but denied the remaining allegations of Blodgett's Petition. (L.F. 24-26.)

[Respondent Mitchell's Cross-Petition]

Respondent Mitchell's Cross-Petition was stated in four counts. (L.F. 26-33.) Count I was a claim for discovery of assets pursuant to Section 474.340, R.S.Mo. 2000, seeking a determination of title to certain items of tangible personal property allegedly being wrongfully detained by Blodgett and belonging to Decedent's probate estate, with Respondent Mitchell allegedly as the ultimate proper recipient of said property (L.F. 26-30); Count II was a claim for partial distribution of all items of tangible personal property of Decedent's probate estate to Respondent Mitchell, on the grounds that Article VI, ¶ F of the Third Amendment to Decedent's Trust constituted a "compliant 'list' within the meaning of Article [Second] of Decedent's Will and R.S.Mo. Section 474.333," with the consequence that all tangible personal property of Decedent's probate estate should be distributed to Respondent Mitchell in accordance with Article VI, ¶ F of the Third Amendment (L.F. 26-

31);⁴ Count III was pleaded in the alternative to Counts I and II and requested the Probate Court to construe the term “list,” as found in Article Second of Decedent’s Will, to include Article VI, ¶ F of the Third Amendment to Decedent’s Trust, such that all of Decedent’s tangible personal probate property be distributed to Respondent Mitchell according to that latter document’s terms (L.F. 26-32); and, lastly, Count IV—also pleaded in the alternative to Counts I and II—requested the Probate Court to reform Decedent’s Will and the Third Amendment to the extent that Article Second of the Will and Article VI, ¶ F of the Third Amendment could be read together to provide for a distribution of all of Decedent’s tangible

⁴With respect to Count II, Respondent Mitchell alleged that Decedent, during her lifetime, gave instructions to Respondent Mitchell regarding distribution of Decedent’s tangible personal property and that Respondent Mitchell was prepared to make distributions in accordance with Decedent’s instructions. (L.F. 28.) Respondent Mitchell also referenced the March 24, 2000 letter from her attorney to the Personal Representative’s attorney (Id.).

personal probate property according to the distribution scheme contained in Article VI, ¶ F of the Third Amendment. (L.F. 26-30, 32-33.)

**G. Respective Motions for Summary Judgment of Blodgett and
Respondent Mitchell**

[Blodgett's Summary Judgment Motion]

On January 25, 2001, Blodgett filed a motion for summary judgment pursuant to Missouri Supreme Court Rule 74.04, requesting a judgment in his favor on his Petition and against Respondent Mitchell on all counts of her Cross-Petition. (LF. 64-74.) Blodgett moved for judgment on his Petition on the basis that Article Second of Decedent's Will provides for a distribution of all the tangible personal property of Decedent's probate estate to Blodgett in the absence of a written list or other specific bequests of tangible personal property in another provision of the Will to the contrary, and that no such list or specific bequests were in existence (*Id.*). With respect to Respondent Mitchell's Cross-Petition, Blodgett moved for summary judgment on the basis that Count's I and II of the Cross-Petition were based on the mistaken contention that Article VI, ¶ F of the Third Amendment to Decedent's Trust constitutes a compliant list under Article Second of the Will and Section 474.333 R.S.Mo. 2000, and that Counts III and IV of the Cross-Petition were incorrect attempts to avoid the requirements for a compliant list under Section 474.333 (*Id.*).

[Respondent Mitchell's Summary Judgment Motion]

On the same day, Respondent Mitchell filed her cross-motion for summary judgment, separate statement of uncontroverted material facts and related materials seeking a judgment

in her favor with respect to her Cross-Petition. (L.F. 75-304.) With respect to Counts I and II of her Cross-Petition, Respondent Mitchell's motion was premised on the grounds that Article VI, ¶ F of Third Amendment to Decedent's Trust is a compliant list within the meaning of Article Second of the Will and Section 474.333, R.S.Mo. 2000, thereby entitling her to distribution of Decedent's tangible personal probate property and discovery of assets allegedly wrongfully taken from Decedent's probate estate by Blodgett. (L.F. 75.) To this end and as part of her statement of uncontroverted material facts, Respondent Mitchell included her own affidavit purporting to reflect oral instructions allegedly given by Decedent to her as to the distribution of Decedent's tangible personal property. (L.F. 300-304.)

H. Probate Court's April 17, 2001 Memorandum Ruling

Both Blodgett and Respondent Mitchell filed their responses to each others' summary judgment motions on March 12, 2001 (L.F. 305-322), and on April 17, 2001 the Probate Court entered a memorandum ruling. (L.F. 323.) In its memorandum ruling, the Probate Court granted Respondent Mitchell's summary judgment motion with respect to (and to the extent of) the relief sought in Count II of her Cross-Petition, adjudicating that Article VI, ¶ F of the Third Amendment to Decedent's Trust is a "list" within the meaning of the Will and Section 474.333, R.S.Mo. 2000, thereby entitling Respondent Mitchell to distribution of all of Decedent's tangible personal property pursuant to that document. (*Id.*).⁵ The Probate Court's April 17, 2001 memorandum ruling reads, in pertinent part, as follows:

⁵Blodgett's summary judgment motion was denied to this extent, and Respondent Mitchell's motion with respect to Count I of her Cross-Petition (for discovery of assets)

The respective motions of Henry Blodgett and Norine Mitchell for summary judgment having been called and heard, both parties appearing by counsel, the Court finds, concludes and adjudges that ¶ F of Article VI of the Third Amendment of Decedent's Trust is a "list" within the meaning of the Will and R.S.Mo. Section 474.333 and that Norine Mitchell is entitled to distribution of all of Decedent's tangible personal property as provided in said ¶ F. Norine's motion is granted to this extent and Henry's motion is denied to this extent. Norine's claim for discovery of assets remains pending.

(Id.).

I. Respondent Mitchell's Motion for Summary Judgment on the Sole Remaining Claim (for Discovery of Assets)

Following the Probate Court's April 17, 2001 memorandum ruling, Respondent Mitchell moved for summary judgment on her claim for discovery of assets (Count I of the Cross-Petition). (L.F. 324-342.) The motion was predicated on the Probate Court's April 17, 2001 memorandum ruling granting partial summary judgment in Respondent Mitchell's favor on the grounds that Article VI, ¶ F of the Third Amendment to Decedent's Trust is a compliant list within the meaning of Article Second of the Will and Section 474.333,

remained pending (Id.).

R.S.Mo. 2000, thereby entitling Respondent Mitchell to distribution of all of the tangible personal property of Decedent's probate estate according to that document's terms (Id.).

J. Probate Court's August 7, 2001 Order and Final Judgment

Blodgett filed his response to the motion on July 19, 2001 (L.F. 4, 343-356), and thereafter, the Probate Court entered its August 7, 2001 Order and Final Judgment sustaining Respondent Mitchell's motion on Count I of her Cross-Petition. (L.F. 357.) The August 7, 2001 Order and Final Judgment also incorporates by reference the April 17, 2001 memorandum ruling and certifies the appealability of both pursuant to Missouri Supreme Court Rule 74.01(b) (Id.).⁶ This appeal follows.

⁶Both the Probate Court's August 7, 2001 Order and Final Judgment and its April 17, 2001 memorandum ruling, as referred to and incorporated within the Court's August 7, 2001 Order and Final Judgment, will hereinafter be collectively referred to as the **"August 7 Judgment."**

POINTS RELIED ON

I. The Probate Court committed reversible error in its August 7 Judgment in granting summary judgment in Respondent Mitchell's favor on Count II of her cross-petition, adjudging that Article VI, ¶ F of the Third Amendment to Decedent's Trust constitutes a "list" within the meaning of Article Second of Decedent's Will and Section 474.333, R.S.Mo. 2000, and in simultaneously denying Blodgett's motion for summary judgment on his Petition seeking distribution of the items of tangible personal probate property to him pursuant to Article Second of Decedent's Will, because the terms of Article VI, ¶ F of the Third Amendment do not satisfy all of the statutory requirements for a "list" under Section 474.333, R.S.Mo. 2000, and because Article VI, ¶ F of the Third Amendment was not timely found by the personal representative of Decedent's probate estate as a compliant "list" in accordance with the terms of Article Second of Decedent's Will, in that:

1. The terms of Article VI, ¶ F of the Third Amendment to Decedent's Trust fail to satisfy the statutory requirements for a list under Section 474.333, R.S.Mo. 2000, as said terms do not describe the items of tangible personal property of Decedent's probate estate or the devisees thereof with reasonable certainty, but instead provide for a distribution of tangible personal property of Decedent's trust estate to Respondent Mitchell for her subsequent distribution to unidentified third persons

allegedly in accordance with unwritten instructions given by Decedent during her lifetime; and, moreover,

2. Contrary to the explicit terms of Article Second of Decedent's Will, Respondent Mitchell's characterization of Article VI, ¶ F of the Third Amendment to Decedent's Trust as being a compliant list under Section 474.333, R.S.Mo. 2000 was not presented to—and, consequently, not found by—the personal representative of Decedent's probate estate until more than 60 days after the Probate Court's issuance of letters testamentary on Decedent's Will.

Bynote v. National Super Markets, Inc., 891 S.W.2d 117, 120 (Mo. banc 1995)

Doll v. Fricke, 171 S.W.2d 755 (Mo. Ct. App. W.D. 1943)

Estate of Webster, 920 S.W.2d 600 (Mo. Ct. App. W.D. 1996)

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993)

Section 474.333 R.S.Mo. 2000

Section 473.340 R.S.Mo. 2000

- II. In addition, the Probate Court's August 7 Judgment must be reversed because there is no other basis in the record upon which it could be affirmed, in that Missouri law does not allow for a judicial rewriting of unambiguous terms of a last will and testament in the guise of will construction or reformation, and

the terms of Article Second of Decedent's Will are clear and unambiguous and resolve distribution of Decedent's tangible personal probate property, notwithstanding that Article VI, ¶ F of the Third Amendment to Decedent's Trust fails as a compliant "list" under Article Second of the Will and Section 474.333, R.S.Mo. 2000. Moreover, the Probate Court would have erred had it entered a judgment substituting the terms of Article Second of the Will with the inconsistent terms of Article VI, ¶ F of the Third Amendment to Decedent's Trust for purposes of distribution of Decedent's tangible personal probate property in the guise of will construction or reformation, because such judgment would be contrary to the following statutory sections of Missouri's probate code, namely:

1. Section 474.400, R.S.Mo. 2000, in that a substitution of the terms of Article Second of the Will with the inconsistent terms of Article VI, ¶ F of the Third Amendment would constitute a method of revocation of Article Second of the Will not prescribed under Section 474.400 and, consequently, not available to Decedent during her lifetime;
2. Sections 473.083 and 473.081, R.S.Mo. 2000, in that a substitution of the terms of Article Second of the Will with the inconsistent terms of Article VI, ¶ F of the Third Amendment would effectively invalidate Article Second of the Will, thereby improperly providing Respondent Mitchell with a will contest remedy under Sections 473.083 and

473.081, notwithstanding that no will contest action was ever brought;
and

3. Section 474.333, R.S.Mo. 2000, in that a substitution of the terms of
Article
Second of the
Will with the
inconsistent
terms of
Article VI, ¶
F of the Third
Amendment
would
impermissibly
validate the
terms of
Article VI, ¶
F of the Third
Amendment
as a compliant
“list” for
purposes of

distribution of
Decedent's
tangible
personal
probate
property
under Article
Second of the
Will in the
guise of will
construction
or
reformation,
notwithstandi
ng that such
terms already
would have
been
adjudicated as
not meeting
the statutory

requirements
for a
compliant
“list” under
Section
474.333.

Boatmen’s Union National Bank v. Welton, 640 S.W.2d 497 (Mo. Ct. App.
S.D. 1982)

In re Estate of Hutchins, 875 S.W.2d 564 (Mo. Ct. App. S.D. 1994)

Matter of Morrissey, 684 S.W.2d 876, 878 (Mo. Ct. App. E.D. 1984)

St. Louis U. Trust Co. v. Brug, 558 S.W.2d 375 (Mo. Ct. App. E.D. 1977)

Section 474.333 R.S.Mo. 2000

Section 474.400 R.S.Mo. 2000

Section 473.083 R.S.Mo. 2000

Section 473.081 R.S.Mo. 2000

- III. The Probate Court committed reversible error in its August 7 Judgment in granting summary judgment in Respondent Mitchell’s favor on Count I of her cross-petition for discovery of assets pursuant to Section 473.340, R.S.Mo. 2000, seeking recovery from Blodgett of certain items of tangible personal property claimed to be assets of Decedent’s probate estate, because but for the

Probate Court's erroneous adjudication of Article VI, ¶ F of the Third Amendment as being a compliant list within the meaning of Article Second of the Will and Section 474.333, R.S.Mo. 2000--and there being no other basis upon which Article VI, ¶ F of the Third Amendment could be adjudicated as a compliant list governing distribution of Decedent's tangible personal probate property-- Respondent Mitchell would have lacked standing to pursue her discovery of assets claim against Blodgett pursuant to Section 473.340, R.S.Mo. 2000, in that Respondent Mitchell would have lacked any beneficial interest under Article Second of the Will as Blodgett would be entitled to distribution of all the tangible personal property of Decedent's probate estate.

Section 473.340, R.S.Mo. 2000

Section 474.333, R.S.Mo. 2000

ARGUMENT

I. The Probate Court committed reversible error in its August 7 Judgment in granting summary judgment in Respondent Mitchell's favor on Count II of her cross-petition, adjudging that Article VI, ¶ F of the Third Amendment to Decedent's Trust constitutes a "list" within the meaning of Article Second of Decedent's Will and Section 474.333, R.S.Mo. 2000, and in simultaneously denying Blodgett's motion for summary judgment on his Petition seeking distribution of the items of tangible personal probate property to him pursuant to Article Second of Decedent's Will, because the terms of Article VI, ¶ F of the Third Amendment do not satisfy all of the statutory requirements for a "list" under Section 474.333, R.S.Mo. 2000, and because Article VI, ¶ F of the Third Amendment was not timely found by the personal representative of Decedent's probate estate as a compliant "list" in accordance with the terms of Article Second of Decedent's Will, in that:

1. The terms of Article VI, ¶ F of the Third Amendment to Decedent's Trust fail to satisfy the statutory requirements for a list under Section 474.333, R.S.Mo. 2000, as said terms do not describe the items of tangible personal property of Decedent's probate estate or the devisees thereof with reasonable certainty, but instead provide for a distribution of tangible personal property of Decedent's trust estate to Respondent Mitchell for her subsequent distribution to unidentified third persons

allegedly in accordance with unwritten instructions given by Decedent during her lifetime; and, moreover,

2. Contrary to the explicit terms of Article Second of Decedent's Will, Respondent Mitchell's characterization of Article VI, ¶ F of the Third Amendment to Decedent's Trust as being a compliant list under Section 474.333, R.S.Mo. 2000 was not presented to—and, consequently, not found by—the personal representative of Decedent's probate estate until more than 60 days after the Probate Court's issuance of letters testamentary on Decedent's Will.

A. Introduction

The dispositive question in this appeal is whether Article VI, ¶ F of the Third Amendment to Decedent's Trust constitutes an effective, written list of Decedent disposing of the items of her tangible personal probate property under Article Second of the Will. Because the answer to this question is “no,” and because there are no specific bequests of tangible personal property in any other provision of the Will, Blodgett is thus entitled to distribution of all the items of tangible personal property of Decedent's probate estate pursuant to Article Second of the Will.

To be effective as a written list disposing of tangible personal probate property under Article Second of Decedent's Will, Article VI, ¶ F of the Third Amendment to Decedent's Trust necessarily must comply with the statutory requirements for a list under Section 474.333, R.S.Mo. 2000. See Estate of Webster, 920 S.W.2d 600, 602 [ftnt.2] (Mo. Ct. App.

W.D. 1996). Contrary to the statutory requirements of Section 474.333, however, the terms of Article VI, ¶ F of the Third Amendment neither describe the items of tangible personal property of Decedent's probate estate, nor the devisees thereof, with reasonable certainty. To be sure, Article VI, ¶ F of the Third Amendment does not reflect a written list--signed by Decedent--disposing of respective items of tangible personal (probate) property to identified recipients. Instead, Article VI, ¶ F of the Third Amendment merely provides for a generic distribution of "all tangible personal property" from Decedent's trust estate to Respondent Mitchell, with corresponding directions that she serve as a middleman for subsequent distributions of such property to unidentified third parties according to unwritten (*i.e. oral*) instructions allegedly given by Decedent during her lifetime. (L.F. 199-201.)

In light of the foregoing, in granting summary judgment on Count II of Respondent Mitchell's Cross-Petition, the Probate Court--in its August 7 Judgment --incorrectly relaxed the standards for a compliant list disposing of tangible personal probate property under Section 474.333, R.S.Mo. 2000. In so doing, Blodgett respectfully submits that the Probate Court erred as a matter of law.

B. Standard of Review

The propriety of summary judgment is purely an issue of law and this Court's standard of review on appeal is essentially *de novo*. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993); see also Marchand v. Safeco Ins. Co. of America, 2 S.W. 3d 826, 828 (Mo. Ct. App. E.D. 1999); Touymayan v. State Farm General Ins. Co., 970 S.W. 2d 822, 824 (Mo. Ct. App. E.D. 1998). The

criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially (Id.).

C. The Interplay Between Articles Second and Third of the Will, and Article VI ¶ F of the Third Amendment

As a threshold matter, it is important to note the interplay between Articles Second and Third of the Will, and Article VI, ¶ F of the Third Amendment (to Decedent’s Trust).

Article Second of the Will provides for the disposal of the items of tangible personal probate property of Decedent’s probate estate pursuant to a written list, which must be found by the personal representative of said estate within sixty (60) days following the issuance of letters testamentary for the Will. (L.F. 5-6.) Article Second further states that in the absence of such written list or any other provision of the Will that specifically bequeaths Decedent’s tangible personal probate property, such property shall go to “Henry W. Blodgett,” if living, otherwise to pass as part of the residue of Decedent’s Probate Estate (Id.).⁷ Article Third of the Will bequeaths the residue of Decedent’s Probate Estate, including the items of tangible

⁷There are no specific bequests of items of tangible personal property set forth in any other provision of the Will. (L.F. 5-11.) Blodgett survived Decedent; indeed, he is still living.

personal probate property not effectively disposed of under Article Second, to the Successor Trustee of Decedent's Trust. (L.F. 6.)

In the event that items of tangible personal property of Decedent's probate estate are bequeathed to Decedent's trust estate through the residuary clause of Article Third of the Will, the distribution of such property is then governed by the terms of the Trust, as amended by the terms of Article VI, ¶ F of the Third Amendment. Thus by advancing the contention that Article VI, ¶ F of Third Amendment is a compliant list for purposes of Article Second of the Will, Respondent Mitchell invites the Court to believe simultaneously that this provision serves as the distribution mechanism for the items of tangible personal property from both Decedent's probate and trust estates.

D. Article VI, ¶ F of the Third Amendment is not a Compliant

List Under Section 474.333, R.S.Mo. 2000

But Article VI, ¶ F of the Third Amendment to Decedent's Trust does not constitute an effective list for purposes of Article Second of the Will, because it does not comply with the requirements of Section 474.333, R.S.Mo. 2000, in that it does not describe the items of tangible personal property of Decedent's probate estate under Article Second of the Will, or the devisees thereof, with reasonable certainty. Section 474.333, R.S.Mo. 2000 reads, in pertinent part, as follows:

474.333. Will may provide for disposal of personal property by separate list

A will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, securities and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by the testator, must be dated and must describe the items and the devisees with reasonable certainty. . . .

(Emphasis added). Accordingly, in order for Article VI, ¶ F of the Third Amendment to constitute a compliant “list” under Section 474.333, R.S.Mo. 2000, and thereby constitute admissible evidence of Decedent’s intended disposition of her tangible personal (probate) property, the following requirements of the statute must be satisfied: **(a)** such writing must either be in the handwriting of Decedent or signed by her; **(b)** it must be dated; and **(c)** it must describe the items of Decedent’s tangible personal (probate) property and devisees thereof with reasonable certainty. Id. Viewed in the light of these statutory requirements, it is self-evident that Article VI, ¶ F of the Third Amendment is not a compliant list for purposes of Article Second of the Will.

Article VI, ¶ F of the Third Amendment to Decedent’s Trust provides as follows:

All of Grantor’s tangible personal property and other personal effects shall be distributed to Grantor’s sister, NORINE MITCHELL, if living, otherwise to her daughter, PAMELA PADGETT, to be distributed in accordance with instructions given by Grantor to them during her life-time.

(L.F. 199-201.) Thus, by its terms, Article VI, ¶ F of the Third Amendment fails as a “list” under Section 474.333, because such terms utterly fail to describe the items of Decedent’s tangible personal (probate) property and the devisees thereof with reasonable certainty. Instead, by its terms, Article VI, ¶ F makes a generic distribution of all of Decedent’s personal (trust) property to Respondent Mitchell, but only for her subsequent distribution to unidentified recipients according to alleged oral instructions of Decedent. Indeed, nowhere within the terms of Article VI, ¶ F is there a provision that even purports to match a respective item of tangible personal property with an identified ultimate recipient thereof.⁸ Consequently, because Article VI, ¶ F of the Third Amendment fails to satisfy these two elemental requirements of Section 474.333, R.S.Mo. 2000, pursuant to that statute the document fails to establish admissible evidence of Decedent’s intended disposition of her tangible personal (probate) property.

E. Respondent Mitchell’s Affidavit is Inadmissible Hearsay

That Article VI, ¶ F of the Third Amendment to Decedent’s Trust does not satisfy the “reasonable certainty” requirements of Section 474.333 is confirmed by Respondent Mitchell herself, both in her Cross-Petition and in her affidavit supporting her cross-motion for summary judgment. To be sure, in her Cross-Petition, Respondent Mitchell implicitly concedes that the terms of Article VI, ¶ F do not reflect the “list” of Decedent’s intended

⁸Conversely, the “List of Tangible Personal Property” exemplar appended to Decedent’s Will clearly contemplates descriptions of “respective” items of tangible personal property and the identity of the ultimate recipients thereof. (L.F. 11; A1.)

dispositions of tangible personal (probate) property when she pleads, “Decedent during her lifetime gave instructions to [Respondent Mitchell] regarding distribution of Decedent’s tangible personal property.” (L.F. 28 [¶ 5].)

Moreover, in her affidavit supporting her cross-motion for summary judgment, Respondent Mitchell ironically shines the proverbial klieg lights on Article VI, ¶ F’s non-compliance with the “reasonable certainty” requirements of Section 474.333, R.S. Mo. 2000, as to both identification of the tangible personal property allegedly to be distributed and the identities of the intended ultimate beneficiaries thereof. (L.F. 300-304.) Indeed, in her affidavit--which was conceived almost 1½ years after letters testamentary had issued on the Will--Respondent Mitchell attests to a grocery list of purported oral instructions allegedly given to her by Decedent that matches distributions of respective items of Decedent’s tangible personal property with identified ultimate recipients. (Id.[¶ 4].) The irony here is that, rather than buttressing the descriptive shortfalls of Article VI, ¶ F’s terms, the detail provided in paragraph 4 of Respondent Mitchell’s affidavit serves only to further undermine the notion that Article VI, ¶ F of the Third Amendment is a compliant list under Section 474.333.⁹

⁹Moreover, Respondent Mitchell’s affidavit is utterly irrelevant in relation to whether the terms of Article VI, ¶ F of the Third Amendment meet the statutory requirements for a list under Section 474.333, R.S.Mo. 2000. To be sure, the issue of whether the terms of Article VI, ¶ F satisfy the requirements for a “list” under Section 474.333 depends exclusively upon the terms themselves meeting the requirements of that

statute.

In any event, Respondent Mitchell's affidavit is nothing more than inadmissible self-serving hearsay. It is a compendium of "out of court statements [of Decedent] to prove the truth of the matter asserted in the statements" (namely, the ostensible list of distributions of the items of Decedent's tangible personal probate property to identified recipients) and, therefore, inadmissible self-serving hearsay. Bynote v. National Super Markets, Inc., 891 S.W. 2d 117, 120 (Mo. banc 1995); see also Doll v. Fricke, 171 S.W. 2d 755, 758 (Mo. Ct. App. W.D. 1943) (Ordinarily, declarations of testator testified to by witnesses after testator's death amount to "hearsay" evidence and cannot be considered for purpose of establishing truth or falsity of facts purported to be stated therein).

F. Article VI, ¶ F of the Third Amendment was not Timely Found to be a List for Purposes of Article Second of the Will

Beyond its failure to comply with the requirements for a list under Section 474.333, R.S.Mo. 2000, Article VI, ¶ F also fails under the terms of Article Second of the Will, in that it was not, nor could it have been, found by the Personal Representative of Decedent's probate estate within sixty (60) days following issuance of letters testamentary for the Will. (L.F. 5-6.) In this regard, letters testamentary issued for the Will on July 29, 1999, and Mitchell first raised her contention to Decedent's Personal Representative that Article VI, ¶ F of the Third Amendment constitutes a compliant "list" on March 24, 2000--approximately seven months after letters testamentary issued for the Will.¹⁰ Indeed, as

¹⁰There is no indication in the record below that any attempt was made within 60 days after letters testamentary issued on the Will to have the Probate Court recognize

shown above, not until nearly 1½ years after letters testamentary were issued for the Will did Respondent Mitchell show her hand that the terms of Article VI, ¶ F of the Third Amendment do not comprise the “list” of Decedent’s intended distributions of tangible personal probate property, but rather her own compendium of inadmissible hearsay statements contained in her affidavit supporting her motion for summary judgment. (L.F. 300-304.)

II. In addition, the Probate Court’s August 7 Judgment must be reversed because there is no other basis in the record upon which it could be affirmed, in that Missouri law does not allow for a judicial rewriting of unambiguous terms of a last will and testament in the guise of will construction or reformation, and the terms of Article Second of Decedent’s Will are clear and unambiguous and resolve distribution of Decedent’s tangible personal probate property, notwithstanding that Article VI, ¶ F of the Third Amendment to Decedent’s Trust fails as a compliant “list” under Article Second of the Will and Section 474.333, R.S.Mo. 2000. Moreover, the Probate Court would have erred had it entered a judgment substituting the terms of Article Second of the Will with the inconsistent terms of Article VI, ¶ F of the Third Amendment to Decedent’s Trust for purposes of distribution of Decedent’s tangible personal probate property in the guise of will construction or reformation, because such

Article VI, ¶ F of the Third Amendment as a compliant list pursuant to the terms of Article Second of the Will and Section 474.333, R.S.Mo. 2000.

judgment would be contrary to the following statutory sections of Missouri's probate code, namely:

1. Section 474.400, R.S.Mo. 2000, in that a substitution of the terms of Article Second of the Will with the inconsistent terms of Article VI, ¶ F of the Third Amendment would constitute a method of revocation of Article Second of the Will not prescribed under Section 474.400 and, consequently, not available to Decedent during her lifetime;
2. Sections 473.083 and 473.081, R.S.Mo. 2000, in that a substitution of the terms of Article Second of the Will with the inconsistent terms of Article VI, ¶ F of the Third Amendment would effectively invalidate Article Second of the Will, thereby improperly providing Respondent Mitchell with a will contest remedy under Sections 473.083 and 473.081, notwithstanding that no will contest action was ever brought; and
3. Section 474.333, R.S.Mo. 2000, in that a substitution of the terms of Article Second of the Will with the inconsistent terms of Article VI, ¶ F of the Third Amendment would impermissibly validate the terms of Article VI, ¶ F of the Third Amendment as a compliant "list" for purposes of distribution of Decedent's tangible personal probate property under Article Second of the Will in the guise of will construction or reformation, notwithstanding that such terms already

would have been adjudicated as not meeting the statutory requirements for a compliant “list” under Section 474.333.

A. Introduction and Standard of Review

Although the standard of review on appeal of summary judgment is de novo, and though the Court may affirm a trial court’s judgment on any of the grounds presented below that are properly supported by the record, ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993), here there is no other basis in the record upon which the Probate Court’s August 7, Judgment could be affirmed. Indeed, there is simply no basis in the record that would have permitted the Probate Court to rewrite the terms of Article Second of the Will in the guise of will construction or reformation absent a compliant written list under Section 474.333, R.S.Mo. 2000, because the terms of Article Second of the Will already clearly and unambiguously provide for distribution of Decedent’s tangible personal probate property in the absence of such written list.

B. No Construction or Reformation of Article Second of the Will is Permitted

**as its Terms
are Clear
and
Unambiguou
s**

To be sure, as shown above, the interplay between Articles Second and Third of the Will, and Article IV, ¶ F of the Third Amendment provide for a straightforward (and

unambiguous) estate plan, even in the absence of a compliant list under Article Second of the Will and Section 474.333, R.S.Mo. 2000. Indeed, it cannot seriously be disputed that Article Second of the Will provides for the disposal of the items of tangible personal property of Decedent's probate estate pursuant to a written list, which must be found by the personal representative of said estate within sixty (60) days following the issuance of letters testamentary for the Will. (L.F. 5-6.)¹¹ It similarly cannot be disputed that Article Second further states that in the absence of such written list or any other provision of the Will that specifically bequeaths Decedent's tangible personal property, such property shall go to "Henry W. Blodgett," if living, otherwise to pass as part of the residue of Decedent's Probate Estate (Id.).¹²

¹¹Indeed, Decedent could have executed a written list that complied with the requirements of Section 474.333, R.S.Mo. 2000, much like the exemplar appended to her Will. (L.F. 11; A1.) For whatever reason, however, Decedent apparently chose not to.

¹²There are no specific bequests of items of tangible personal property set forth in

any other provision of the Will. (L.F. 5-11.) Blodgett survived Decedent; indeed, he is still living.

Further it cannot be disputed that Article Third of the Will bequeaths the residue of Decedent's probate estate, including the items of tangible personal property not effectively disposed of under Article Second, to the Successor Trustee of Decedent's Trust. (L.F. 6.)¹³

¹³Had Decedent desired to incorporate the terms of Article VI, ¶ F of the Third Amendment to her Trust into Article Second of the Will, she could have accomplished the same (but apparently chose not to) through amendment by codicil, making specific reference to the terms of Article VI, ¶ F. See Lorch v. Mercantile Trust Co. Nat'l. Ass'n., 651 S.W.2d 540, 544 (Mo. Ct. App. E.D. 1983); Malone v. Moberly, 55 S.W.2d 1008, 1009 (Mo. App. K.C. 1932) (citations omitted). By contrast, however, Decedent did specifically incorporate the terms of her Trust into the residuary clause of her Will, as set

And, finally, it cannot be disputed that, in the event that items of tangible personal property of Decedent's Probate Estate are bequeathed to Decedent's Trust Estate through the residuary clause of Article Third of the Will, the distribution of such property only then is governed by the terms of the Trust, as amended by the terms of Article VI, ¶ F of the Third Amendment to Decedent's Trust. (L.F. 6; 199-201.)¹⁴

forth under Article Third thereof. (L.F. 6.)

¹⁴Decedent also could have by-passed her Will altogether by, for example, making lifetime transfers (i.e. conveyances) of all of her tangible personal property to specified recipients, or to the trustee of her Trust.

The cardinal rule of construction under Missouri law is that the settlor's intent is controlling and that this intent must be ascertained primarily from the [dispositive] instrument as a whole. Boatmen's Trust Co. v. Sugden, 827 S.W.2d 249, 253 (Mo. Ct. App. E.D. 1992) (citations omitted).¹⁵ Courts must look to the language used in the instrument, not to the result of the distribution plan. Id. Courts are precluded from making what may seem to be a more equitable distribution than that which is expressly provided for in the instrument. Id. The mere fact the parties disagree upon the interpretation of a document does not render it ambiguous. Id. at 254. The law of Missouri is very clear that a court may not rewrite the terms of a will under the guise of will construction or reformation. See Johnson v. Wheeler, 228 S.W.2d 714 (Mo. 1950); In re Estate of Moore, 889 S.W.2d 136 (Mo. Ct. App. E.D. 1994); St. Louis U. Trust Co. v. Brug, 558 S.W.2d 375 (Mo. Ct. App. E.D. 1977); see also In re Estate of Welter, 528 S.W.2d 618, 619 (Mo. Ct. App. S.D. 1980) (Intentions of testator must be gleaned from written unambiguous will, not from what testator or will's scrivener, after execution of instrument, contrarily declared, either orally or in writing, to be testator's intentions or meaning of provisions in will).

Thus, under the law of Missouri pertaining to will construction or reformation there is simply no basis under which the Probate Court could have rendered a judgment upsetting the terms of Article Second of the Will in the guise of will construction or reformation. Indeed, as shown above, absent a compliant written list under Section 474.333, R.S.Mo.

¹⁵Courts generally apply the same rules for construing both trusts and wills. See Central Trust Bank v. Scrivner, 963 S.W.2d 383,385. (Mo. App. W.D. 1998.)

2000--or any other specific bequests in the Will--Article Second's terms clearly and unambiguously direct distribution of Decedent's tangible personal probate property to Blodgett. In this regard, that the contrivance of Article VI, ¶ F of the Third Amendment as being a compliant list under Article Second of the Will is shown to be demonstrably incorrect as a matter of law under Section 474.333, R.S.Mo. 2000, does not thereby render the terms of Article Second ambiguous. As shown above, that is because the terms of Article Second specifically anticipate--and provide for--distribution of Decedent's tangible personal probate property in the absence of a written list.

C. Respondent Mitchell's anticipated arguments do not compel a contrary conclusion.

Blodgett anticipates that Respondent Mitchell will argue that Decedent's testamentary instruments would be rendered latently ambiguous were Article VI, ¶ F of the Third Amendment to Decedent's Trust determined not to be a compliant list under Article Second of the Will and Section 474.333, R.S.Mo. 2000. Blodgett anticipates that Respondent Mitchell will then argue that extrinsic evidence, such as the affidavit of the Will's scrivener and her own affidavit, among other things, should be admissible to resolve the latent ambiguity.¹⁶ Respondent Mitchell's argument fails as a matter of law.

¹⁶As shown at above, for Article VI, ¶ F of the Third Amendment to be admissible under Section 474.333, R.S.Mo. 2000, as evidence of Decedent's "intended disposition" of her tangible personal property, that Trust provision would have to meet the requirements of Section 474.333.

A latent ambiguity in a will occurs when the instrument itself is unambiguous on its face but becomes open to more than one interpretation when applied to the factual situation in issue. Matter of Morrissey, 684 S.W.2d 876, 878 (Mo. Ct. App. E.D. 1984)(citing Boatmen's Union National Bank v. Welton, 640 S.W.2d 497, 502 (Mo. Ct. App. S.D. 1982)). Two types of wills which present latent ambiguities are those (1) which explicitly describe a person or thing when two or more persons or things fit exactly the description or condition in the will, and (2) those which describe a condition or thing which no person or things fit in part and imperfectly. Id. at 878-79 (citing Breckner v. Prestwood, 600 S.W.2d 52, 55 (Mo. Ct. App. E.D. 1980)).

In this case, neither of the above two circumstances giving rise to a latent ambiguity apply. To be sure, the terms of Article Second of the Will definitively resolve distribution of Decedent's tangible personal probate property regardless whether the terms of Article VI, ¶ F of the Third Amendment fail as a compliant list under Section 474.333 R.S.Mo. 2000, and regardless whether Decedent ever once had a compliant list but which--for whatever circumstance--no longer exists.

Moreover, the Probate Court would have erred had it entered a judgment substituting the terms of Article Second of the Will with the inconsistent terms of Article VI, ¶ F of the Third Amendment to Decedent's Trust for purposes of distribution of Decedent's tangible personal probate property in the guise of will construction or reformation, because such judgment would be contrary to the following statutory sections of Missouri's probate code,

namely: Section 474.400, R.S.Mo. 2000; Sections 473.083 and 473.081, R.S.Mo. 2000; and Section 474.333, R.S.Mo.2000.

D. Revocation of will by acts not prescribed under Section 474.400, R.S.Mo. 2000

To be sure, had the Probate Court substituted the clear distributive scheme for distribution of Decedent's tangible personal probate property contained in Article Second of the Will with the terms of ¶ F of the Third Amendment to Decedent's Trust, such action would have effectively revoked a portion--if not all--of Article Second of the Will. In doing so, the Probate Court's adjudication would clearly be contrary to the terms of Section 474.400, R.S.Mo. 2000 of Missouri's probate code, which set forth the statutory requirements by which a testator/testatrix can revoke a last will and testament. Section 474.400, R.S.Mo. 2000, reads as follows:

No will in writing, except in the cases herein mentioned, nor any part thereof, shall be revoked, except by a subsequent will in writing, or by burning, canceling, tearing or obliterating the same, by the testator, or in his presence, and by his consent and direction.

Section 474.400, R.S.Mo. 2000, thus specifically provides how a last will and testament, or a part thereof, may be revoked. A will can be revoked by burning or tearing, among other statutorily permissible actions. (Id.) A part of a will may only be revoked by a subsequent will or codicil in writing. (Id.) Nowhere, however, do the terms of Section

474.400 provide that all or a portion of a will may be revoked based on its distributive terms being in apparent conflict with those from another estate planning document. To be sure, the terms of ¶ F of the Third Amendment to Decedent's Trust in no way comprise a subsequent will or a codicil to Decedent's Will. Consequently, had the Probate Court substituted the terms of Article Second of the Will with the inconsistent terms of Article VI, ¶ F of the Third Amendment, such an adjudication would have constituted a method of revocation of Article Second not prescribed under Section 474.400 and, consequently, not available to Decedent during her lifetime.

E. Invalidation of all or a portion of a will absent a successful will contest

Likewise, had the Probate Court substituted the terms of Article Second of the Will with those of ¶ F of the Third Amendment to Decedent's Trust for purposes of distribution of Decedent's tangible personal probate property, the Probate Court's action would have effectively invalidated Article Second of the Will and improperly granted to Respondent Mitchell the remedy of a partial will contest under Sections 473.081 and 473.083, R.S.Mo. 2000. The Probate Court's action thus would have been completely at odds with these two statutory provisions of Missouri's probate code, as a will cannot be partially invalidated absent a timely--not to mention successful--will contest action initiated pursuant to these two statutory provisions. Here, no will contest action was ever brought.

Missouri appellate courts have consistently rejected attempts by litigants to bring alternative actions which were, in substance, untimely attempts to contest the validity of a will. See e.g. In Re Estate of Moore, 889 S.W.2d 136 (Mo. Ct. App. E.D. 1994) (finding that

plaintiff's action to construe a will was actually a will contest and therefore barred by the six-month statute of limitations in Section 473.083.1); see also In Re Estate of Hutchins, 875 S.W.2d 564. (Mo. Ct. App. S.D. 1994.) In Hutchins, for example, plaintiffs, heirs at law of the decedent, filed a petition characterized as an action to construe a will. At the time plaintiffs filed this action, the decedent's will had already been admitted to probate and plaintiffs had not initiated a will contest within the six month period prescribed by Section 473.083. In their petition, plaintiffs prayed that a portion of the will be declared void and that the property referred to in that portion of the will be distributed according to the rules of intestate succession. The court found that although plaintiffs characterized their action as one for construction of a will, in essence, their action was an attempt to challenge the admission of the will to probate because they sought to have the residuary clause ruled void. The court, therefore, affirmed the trial court's dismissal of the petition stating that "the efficacy of the will must be determined in a will contest action. Id. at 567 (emphasis added).

C. Improper construction of a writing not a "list" under

Section 474.333, R.S.Mo. 2000

Moreover, had the Probate Court adjudicated that a writing it found not to be a "list" under Section 474.333, R.S.Mo. 2000, could nonetheless be construed as such, such an adjudication would have effectively rendered the requirements of Section 474.333 a nullity. To be sure, such an adjudication would have been contrary to the explicit requirements for a "list" under Section 474.333, R.S.Mo. 2000. Indeed, on the one hand, had the Probate Court correctly found Article VI, ¶ F of the Third Amendment to Decedent's Trust not to

be a compliant “list” within the meaning of Article Second of the Will and Section 474.333, yet, on the other hand, nonetheless substituted the terms of ¶ F of the Third Amendment for the explicit terms of Article Second of the Will in the guise of will construction or reformation, the Probate Court’s adjudication would have effectively circumvented the requirements for a list under Section 474.333.¹⁷

¹⁷By its terms, compliance with the statutory requirements of Section 474.333 evidences a testator/testatrix’s dispositive intent with respect to distribution of tangible personal probate property.

III. The Probate Court committed reversible error in its August 7 Judgment in granting summary judgment in Respondent Mitchell's favor on Count I of her cross-petition for discovery of assets pursuant to Section 473.340, R.S.Mo. 2000, seeking recovery from Blodgett of certain items of tangible personal property claimed to be assets of Decedent's probate estate, because but for the Probate Court's erroneous adjudication of Article VI, ¶ F of the Third Amendment as being a compliant list within the meaning of Article Second of the Will and Section 474.333, R.S.Mo. 2000--and there being no other basis upon which Article VI, ¶ F of the Third Amendment could be adjudicated as a compliant list governing distribution of Decedent's tangible personal probate property-- Respondent Mitchell would have lacked standing to pursue her discovery of assets claim against Blodgett pursuant to Section 473.340, R.S.Mo. 2000, in that Respondent Mitchell would have lacked any beneficial interest under Article Second of the Will as Blodgett would be entitled to distribution of all the tangible personal property of Decedent's probate estate.¹⁸

¹⁸The standard of review is *de novo* for the same reasons as stated in Point I, subsection B of this Substitute Brief.

Subsection one of Missouri's discovery of assets statute, namely Section 473.340, R.S.Mo. 2000, reads as follows:

473.340. Discovery of assets, procedure for

1. Any personal representative, administrator, creditor, beneficiary or other person who claims an interest in property which is claimed to be an asset of an estate of which is claimed should be an asset of an estate may file a verified petition in the probate division of the circuit court in which said estate is pending seeking determination of the title, or right of possession thereto, or both. . . .

(Emphasis added).

Respondent Mitchell's alleged standing to pursue her discovery of assets claim under Count I of her Cross-Petition is premised on her claim to an interest in Decedent's tangible personal (probate) property under Article Second of the Will, insofar as Article VI, ¶ F of the Third Amendment is deemed to be a compliant list under Section 474.333, R.S.Mo. 2000. (L.F. 26-30.) Consequently, had the Probate Court correctly adjudged Article VI, ¶ F of the Third Amendment not to be a compliant list under Section 474.333--and there being no other basis upon which Article VI, ¶ F of the Third Amendment could be adjudicated as a compliant list governing distribution of Decedent's tangible personal probate property--Respondent Mitchell's standing to pursue her discovery of assets claim under Count I of her Cross-Petition would have been extinguished under the terms of Section 473.340.1, R.S.Mo. 2000, because she would no longer have an interest in the items of tangible personal property

under the Will. This is so because by operation of the terms of Article Second of the Will, Blodgett would be entitled to distribution of all the items of Decedent's tangible personal (probate) property. (L.F. 5-6.)

CONCLUSION

For the above and foregoing reasons, Appellant Henry W. Blodgett respectfully requests this Court to reverse the Probate Court's August 7 Judgment; to remand this cause to the Probate Court with instructions to dismiss Respondent Mitchell's Cross-Petition in its entirety; and to further instruct the Probate Court to order the Personal Representative to make distribution of all of Decedent's tangible personal probate property to Appellant Henry W. Blodgett pursuant to Article Second of the Will; and to enter such other and further orders for relief as the Court deems just and proper.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

The undersigned certifies that on the 29th day of October, 2002, two copies of appellants' substitute brief and a disk containing same were deposited in the United States

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Subscribed to and sworn before be this 29th day of October, 2002.

Notary Public

My Commission Expires:

CERTIFICATION OF COMPLIANCE

The undersigned certifies that appellant's substitute brief complies with the limitations in Rule 84.06 of the Missouri Rules of Civil Procedure, contains 11,387 words and 1,361 lines, and that the computer disk filed with appellant's brief under Rule 84.06 has been scanned for viruses and is virus-free.

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